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REDACTED VERSION

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Attorneys for Debtors and Debtors in Possession

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case Nos. BK-S-06-10725 LBR
 Case Nos. BK-S-06-10726 LBR
 Case Nos. BK-S-06-10727 LBR
 Case Nos. BK-S-06-10728 LBR
 Case Nos. BK-S-06-10729 LBR

In re:
USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
**USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,**
 Debtor.

Chapter 11

Jointly Administered Under
 Case No. BK-S-06-10725 LBR

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

**EX PARTE APPLICATION TO FILE
 MOTION UNDER SEAL
 [AFFECTS USA COMMERCIAL
 MORTGAGE COMPANY]**

In re:
USA SECURITIES, LLC,
 Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Date of Hearing: N/A
 Time of Hearing: N/A

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1 Debtor and Debtor in Possession USA COMMERCIAL MORTGAGE COMPANY
 2 ("USACM" or "Debtor"), by and through its counsel, Schwartzer & McPherson Law Firm, hereby
 3 files this *Ex Parte* Application To File Motion Under Seal. This Application is being made
 4 pursuant to 11 U.S.C. § 107, Fed.R.Bankr. P. 9018, LR 9018, and the Points And Authorities set
 5 forth herein. As set forth below, the Debtor respectfully requests that this Court seal the motion
 6 submitted herewith and any responses that may be filed to the Motion, and order that any party
 7 who obtains a copy of the motion to be sealed be ordered to keep it confidential.

8 POINT AND AUTHORITIES

9 Factual Background

10 1. All five Debtors in the captioned heading above (the "Debtors") filed their
 11 voluntary petitions for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code
 12 on April 13, 2006 (the "Petition Date"). The Debtors continue to operate their businesses and
 13 possess their property as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

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1
2
3 . Although the Debtor is
4 requesting that the Motion be sealed, the Debtor will noti
5 he official committees in each of the Debtors' cases, the United States Trustee, and
6 out the Debtor hereby requests that the Court enter an order requiring
7 these parties who receive notice to keep the Motion and its contents confidential. The Debtor
8 further requests that any response to the Motion also be filed under seal.

9 **Memorandum of the Law**

10 11 U.S.C. § 107 pertains to public access to pleadings and provides, in relevant part:

11 (a) Except as provided in subsection (b) of this section, a paper filed in a case under
12 this title and the dockets of a bankruptcy court are public records and open to
13 examination by an entity at reasonable times without charge.

14 (b) On request of a party in interest, the bankruptcy court shall, and on the
15 bankruptcy court's own motion, the bankruptcy court may--

16 (1) protect an entity with respect to a trade secret or confidential research,
17 development, or commercial information[.]

18

19 (3) The United States trustee, bankruptcy administrator, trustee, and any
20 auditor serving under section 586(f) of title 28-

21 (A) shall have full access to all information contained in any paper filed
22 or submitted in a case under this title; and

23 (B) shall not disclose information specifically protected by the court under
24 this title.

25 11 U.S.C. § 107.

26 As explained in Senate Report No. 989, § 107(b) "permits the court, on its own
27 motion, and requires the court, on the request of a party in interest, to protect trade
28 secrets, confidential research, development, or commercial information." S. Rep.
No. 989, supra, para 107.01, at 107-2. Thus, if the information fits any of the
specified categories the court is *required* to protect a requesting interested party and
has no discretion to deny the application. 2 *Collier on Bankruptcy*, supra, para.
107.01, at 107-2 ("Protection is mandatory when requested by an [interested
party]").

. . . .

. . . .

1 Commercial information has been defined as information which would
 2 cause "an unfair advantage to competitors by providing them information as to the
 3 commercial operation of the debtor." *Ad Hoc Protective Comm. For 101/2%
 4 Debenture Holders v. Itel Corp. (In re Itel Corp.)*, 17 B.R. 942, 944 (9th Cir. BAP
 5 1982).

6 Video Software Dealers Ass'n v. Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994)(emphasis in
 7 original).

8 In Video Software Dealers Ass'n v. Orion Pictures Corp., 21 F.3d 24 (2d Cir. 1994), the
 9 court permitted the debtor, Orion Pictures, to seal all documents relating to its promotional
 10 agreement with McDonald's Corporation involving the distribution of certain video cassettes of a
 11 movie. The plaintiffs/appellants' members had purchased approximately 500,000 copies of this
 12 movie from Orion Pictures for \$64 more per copy than McDonald's was selling them as part of its
 13 promotional agreement with the debtor. As a result, they sought full access to the documents
 14 between the debtor and McDonald's. The Court noted that the bankruptcy court had reviewed
 15 these documents *in camera* and determined that they contained confidential commercial
 16 information. The bankruptcy court found that the licensing agreement involving McDonalds
 17 **"renders very likely a direct and adverse impairment to Orion's ability to negotiate
 18 favorable promotional agreements * * *, thereby giving Orion's competitors an unfair
 19 advantage."** *Id.* at 28 (emphasis added).

20 Even if the Motion is determined to contain information that is not determined to be
 21 "commercial information" and therefore required to be sealed, it has been held that the criteria to
 22 be considered in determining whether settlements should be kept from public access must be
 23 flexible and vary according to the nature of the settlement and the specific extent and impact of the
 24 settlement on the bankruptcy case. In re Hemple, 295 B.R. 200, 202 (Bankr. D.Vt. 2003)(citing
 25 Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982)(in the context of Fed.R.Civ. P. 26 that the decision
 26 to seal is "an exercise of judgment" that must be considered in light of "[t]he importance of the
 27 material to the adjudication, the damage disclosure might cause, and the public interest in such
 28 materials")). In determining whether a document should be sealed or available to the public,
 relevant factors to consider include:

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(1) the necessity of the settlement to the viability of the bankruptcy case; (2) whether the confidentiality provision is truly essential to the settlement, *i.e.*, whether the settlement would be withdrawn if the confidential provision were not honored; (3) whether the creditors have been notified of the request for approval of the settlement without disclosure of the amount or terms of settlement, and, if so, whether any objection was interposed; (4) if there has been an objection to the request to file the agreement under seal, whether the objection demonstrates harm to the public's need to know; (5) whether the creditors will clearly benefit from the settlement notwithstanding a lack of access to the specific terms of that settlement; (6) whether the debtor will suffer irreparable harm if the settlement agreement is not filed under seal; (7) whether the parties would be able to keep the terms of the settlement confidential in the absence of a bankruptcy filing; (8) whose interests are being protected by allowing the filing of the settlement agreement under seal and whether there is any negative impact either on the estate or in the treatment of other interested parties in the case; (9) what is the likelihood of other parties actually obtaining the details of the agreement if it is not filed under seal; and (10) whether the document needs to be kept under seal permanently or some shorter time period could suffice.

Id. at 202.

Further, the Debtor notes that it will notice the of the Motion as they would normally under the applicable agreement with the Debtor. Although there is a large number of the Debtor believes that having this Motion filed under seal will assist in keeping the information regarding the be held confidential among these Direct Lenders. the United States Trustee,

1 and the official committees appointed in the Debtors' cases will also receive notice of the Motion;
 2 however, the Debtor hereby requests that the Court enter an order requiring these parties, along
 3 with the Direct Lenders, to keep the Motion and its contents confidential. Thus, it is only creditors
 4 under the limited mailing matrix who will not receive notice of this motion. Despite providing
 5 this notice to these parties, the Debtor believes that if the Motion is sealed, it is more likely that
 6 the media which has attended most, if not all hearings, will not learn of and publicize the Motion's
 7 contents.

8 In these circumstances, the Debtor does not believe that sealing the Motion will be
 9 detrimental to the concept of providing public access to pleadings. The Debtor does not seek to
 10 have the Motion permanently sealed, and once the Debtor has finished all of its collection efforts,
 11 the documents can be unsealed for public access.

12 CONCLUSION

13 The Debtor requests that this Application be granted, and that the Court seal the
 14 Motion To
 15 submitted herewith and any
 16 responses that may be filed to the Motion, and order that any party who obtains a copy of the
 17 motion to be sealed through notice by the Debtor be ordered to keep it confidential.

18 DATED: October 10, 2006.

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27 /s/ Jeanette E. McPherson

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